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GUNALAN PECHIMUTU v. PACIFIC & ORIENT INSURANCE CO BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
HADHARIAH SYED ISMAIL JCA
AZMAN ABDULLAH JCA
B AZMI ARIFFIN JCA
[CIVIL APPEAL NO: J-04(IM)-493-10-2022]
13 FEBRUARY 2024

C **Abstract** – *(i) An order of the court, in allowing intervention and remitting the case back to the court below, does not constitute a final ruling as it is a procedural decision giving a party the chance to be heard; and (ii) The right to intervene exists throughout any part of court proceedings, but such right is limited to the period prior to the judgment. The proceedings conclude once the judgment is pronounced and in such* D *circumstance, there would no longer exist a case for a party to intervene. The court had become functus officio.*

E ***CIVIL PROCEDURE:*** *Judgments and orders – Ruling – High Court allowed appeal against decision of Sessions Court and made orders – Leave granted for party to intervene and be made party in Sessions Court proceedings – Matter remitted to Sessions Court to hear application – Whether High Court order a ruling – Whether appealable*

F ***CIVIL PROCEDURE:*** *Intervener – Leave – Leave to intervene after proceedings concluded – Judgment pronounced – Whether court functus officio – Whether proceedings in existence for applicant to intervene*

The appellant had commenced personal injuries and pecuniary losses claim against the second respondent at the Sessions Court, following a road accident between the two. Unknown to the appellant, the first respondent had G obtained a declaratory order from the High Court which declared that the insurance policy issued to the second respondent in respect of the motorcycle was null and unenforceable. Meanwhile, at the Sessions Court, an interlocutory judgment in default ('JID') was entered against the second respondent. The appellant then proceeded with the assessment of damages. H The Sessions Court entered the said judgment against the second respondent ('judgment dated 29 March 2017'). The appellant later filed a recovery action against the first respondent at the High Court, demanding the first respondent to pay the judgment sum of RM2.5 million ordered by the Sessions Court. The first respondent filed a notice of application for an order, *inter alia*, that I (i) leave be granted to the first respondent to intervene in the Sessions Court proceeding as the second defendant; and (ii) the Sessions Court order be set aside ('encl. 25'). The Sessions Court Judge ('SCJ') dismissed encl. 25 on the grounds that, *inter alia*, (i) the proceedings below had concluded; and (ii) the

first respondent was estopped from intervening in the proceedings below by their previous conduct in discharging their solicitors from defending the second respondent against the appellant's claims ('SC order'). The first respondent appealed to the High Court against the decision of the Sessions Court. The High Court allowed the first respondent's appeal and made the following orders, *inter alia*, (i) leave was granted to the first respondent to intervene and to be made the second defendant in the Sessions Court proceedings; and (ii) the matter be remitted to the Sessions Court to hear the first respondent's application to set aside the JID ('HC order'). In the High Court Judge's ('HCJ') judgment, His Lordship held that the HC order was a ruling and hence, was not appealable. This was the appellant's appeal against the HC order, grounded upon the following issues: (i) the HC order was not a ruling; (ii) the Sessions Court proceedings had concluded; (iii) the first respondent was estopped from filing encl. 25; and (iv) the judgment dated 29 March 2017 was a final judgment and could not be set aside.

Held (allowing appeal; setting aside order of High Court)
Per Hadhariah Syed Ismail JCA delivering the judgment of the court:

(1) When the High Court heard the appeal, it was sitting as an appellate court, exercising its appellate jurisdiction over the SC order. This was an interlocutory appeal. There was no preliminary issue at the hearing of the appeal that required the HCJ to make a ruling. The only role the HCJ had was to determine whether the Sessions Court had applied a wrong principle or had taken into account irrelevant matters or excluded matters that it ought to have taken into account when it did not allow intervention and the setting aside of the judgment dated 29 March 2017. In this case, the HCJ had (i) allowed the first respondent's appeal in part by setting aside the SC order and allowing intervention; and (ii) ordered for the matter to be remitted to the Sessions Court to hear the first respondent's application to set aside the judgment dated 29 March 2017. The effect of remitting the matter to the Sessions Court was two-fold; first, the High Court had instructed the SCJ to hear the first respondent's application to set aside the judgment dated 29 March 2017 again for the second time and secondly, the first respondent was given a second chance to set aside the judgment. Both orders of the High Court were not a ruling but a decision which were detrimental to the appellant and were, therefore, appealable. (paras 25 & 26)

(2) The proceedings at the Sessions Court had concluded with the pronouncement of the judgment dated 29 March 2017. The said judgment had (i) disposed of the rights and liabilities of the parties; and (ii) clearly stated that the second respondent was liable 100%. Quantum was then assessed at RM2.5 million. There was no issue left to be determined. Enclosure 25 was filed three years after the judgment was entered on 29 March 2017. The proceedings had long concluded and the

Sessions Court was *functus officio* when encl. 25 was filed. Hence, there was no proceeding in existence for the first respondent to intervene. Consequentially, there was no error in the SC order in disallowing intervention. It followed that there was no justification for the High Court to set aside the SC order. (paras 29 & 30)

(3) Despite obtaining the declaratory order, the first respondent had ample opportunity to disprove the appellant's case against the second respondent by joining the Sessions Court proceeding as the second defendant before the proceedings were concluded. However, the first respondent made a conscious decision not to defend the appellant's claim and to abandon the second respondent. It was too late now for the first respondent to argue that, as the ultimate paymaster, they should be allowed to intervene and set aside the judgment. Estoppel by conduct barred the first respondent from filing encl. 25. (para 35)

(4) It was erroneous for the first respondent to label the judgment dated 29 March 2017 as a default judgment when, in actual fact, it was a judgment after damages had been assessed and was a final judgment. The said judgment was a regular valid judgment and enforceable against the first respondent. Not only the first respondent could not apply to set aside the said judgment in the same action but the Sessions Court also had no power to set aside its own order after it had been entered. The only way to overcome this hurdle was for the first respondent to file a fresh action to set aside the said judgment. (paras 38 & 40)

Case(s) referred to:

Adzmi Ali & Anor v. Mohd Isa Kasad [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 SC ***(refd)***
Am General Insurance Bhd v. Iskandar Mohd Nuli [2016] 2 CLJ 1 CA ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1980] CLJU 92; [1980] 1 LNS 92 FC ***(refd)***
Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***
Wong Thin Yit v. Mohamed Ali [1971] CLJU 151; [1971] 1 LNS 151 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101
Road Transport Act 1987, s. 96(3)
Rules of Court 2012, O. 4 r. 6(2), O. 15 r. 4(1), (3)

For the appellant - Christie Soosay & Lee Yen Yee; M/s Teo & Assocs
For the 1st respondent - RK Nathan, Vinod Kamalanathan & Anis Amirah Zakaria; M/s Vinod Kamalanathan & Assocs
For the 2nd respondent - SK Lee; M/s SK Lee

[Editor's note: For the High Court judgment, please see Pacific & Orient Insurance Co Bhd v. Gunalan Pechimutu & Anor [2023] CLJU 529; [2023] 1 LNS 529 (overruled).]

Reported by Najib Tamby

JUDGMENT

Hadhariah Syed Ismail JCA:

Introduction

[1] This is a case of a road traffic accident claims, emanated from the Sessions Court at Johor Bahru. The appellant is the plaintiff in the original suit. The second respondent is the defendant. The first respondent is the insurer of the second respondent.

[2] On 29 March 2017, the Sessions Court entered a judgment in favour of the appellant for the sum of more than RM2.5 million (the said judgment).

[3] On 5 October 2020, *via* a notice of application (encl. 25), the first respondent applied to the Sessions Court to intervene in the Sessions Court proceedings and to set aside the judgment dated 29 March 2017 on the grounds that it was not a judgment based on the merits of the case.

[4] On 25 May 2021, the learned Sessions Court Judge dismissed encl. 25 with costs.

[5] On 5 July 2021, the first respondent appealed to the High Court against the decision of the Sessions Court on 25 May 2021.

[6] On 26 September 2022, the learned High Court Judge allowed the first respondent's appeal and made the following orders:

(i) leave is granted to the first respondent to intervene and to be made the second defendant in the Sessions Court proceedings;

(ii) the matter be remitted to the Sessions Court to hear the first respondent's application to set aside the judgment in default dated 29 March 2017; and

(iii) the appellant to pay costs of RM5,000 to the first respondent.

[7] In his judgment, the learned High Court Judge held that the High Court order dated 26 September 2022 is a ruling and hence not appealable.

[8] This is the appellant's appeal against the High Court order dated 26 September 2022.

Brief Background Facts

[9] On 17 December 2014, the appellant was riding motorcycle No. JPQ 5788 along Jalan Johor Bahru – Kota Tinggi when motorcycle No. JQM 3044 ridden by the second respondent collided into him.

[10] The appellant suffered severe injuries and commenced personal injuries and pecuniary losses claim against the second respondent *via* Civil Suit No: A53KJ-894-10-2015 at the Sessions Court of Johor Bahru.

[11] On 19 November 2015, Messrs VM Kumaran & Co was appointed by the first respondent to defend the second respondent and filed the defence of the second respondent.

[12] Unknown to the appellant, on 16 June 2016, the first respondent filed Originating Summons No: WA-24NCC-259-06-2016 at the Kuala Lumpur High Court and obtained a declaratory order dated 19 July 2016, which declared that the insurance policy issued to the second respondent in respect of motorcycle No. JQM 3044 is null and unenforceable.

[13] The declaratory order was applied purportedly based on the second respondent's admission that he was never involved in the said accident; that his initial police report admitting to the accident was a false report and that the appellant's claim was a fraud.

[14] It is not in dispute that the appellant was not named as a party in the Originating Summons No: WA-24NCC-259-6-2016, despite the express provision in s. 96(3) of the Road Transport Act 1987 that the cause papers need to be served on the appellant.

[15] On 15 September 2016, upon the instructions of the first respondent, Messrs VM Kumaran & Co applied to discharge themselves from acting for the second respondent. The Sessions Court Judge granted order in terms on 23 November 2016.

[16] On 7 February 2017, an interlocutory judgment in default was entered against the second respondent.

[17] On 22 February 2017, the appellant proceeded with the assessment of damages. Two witnesses, namely the appellant and his mother gave evidence in court and the submission was heard.

[18] On 29 March 2017, the Sessions Court entered the said judgment against the second respondent.

[19] On 18 September 2020, the appellant filed a recovery action against the first respondent *vide* Originating Summons No: JA-24NCVC-526-09-2020 at the Johor Bahru High Court, demanding the first respondent to pay the judgment sum of RM2.5 million ordered by the Sessions Court in the judgment dated 29 March 2017.

[20] On 5 October 2020, the first respondent filed a notice of application (encl. 25) under O. 15 r. 4(1) and/or O. 4 r. 6(2) and O. 15 r. 4(3) of the Rules of Court 2012 for an order, *inter alia*; that leave be granted to the first respondent to intervene in the Sessions Court proceeding as the second defendant; that the Sessions Court order dated 29 March 2017 be set aside; and that the appellant pay costs to the second respondent and the proposed intervener.

[21] The learned Sessions Judge dismissed encl. 25 for the following reasons:

(i) the first respondent had cited the incorrect provisions of the Rules of Court 2012 in respect of encl. 25;

(ii) the proceedings below had concluded;

(iii) the first respondent was estopped from intervening in the proceedings below by their previous conduct in discharging their solicitors from defending the second respondent against the appellant's claims; and

(iv) the Sessions Court was not the correct forum to ventilate the first respondent's allegation of fraud. The first respondent ought to have taken out separate proceedings to set aside the judgment dated 29 March 2017 on the grounds of purported fraud.

The Issues Raised In This Appeal

[22] Essentially, the appellant had raised four main issues as follows:

(i) the High Court order dated 26 September 2022 is not a ruling.

(ii) the Sessions Court proceedings had concluded.

(iii) the first respondent was estopped from filing encl. 25.

(iv) judgment dated 29 March 2017 is a final judgment and cannot be set aside.

High Court Order Dated 26 September 2022 Is Not A Ruling

[23] Learned counsel for the appellant submitted that the learned High Court Judge erred in holding that the High Court order dated 26 September 2022 was a ruling and hence not appealable for the following reasons:

(i) there was no trial or proceedings before the High Court. As such, the 26 September 2022 order cannot be a ruling made in the midst of a trial or proceedings.

(ii) instead, the High Court was sitting as an appellate court and exercising its appellate jurisdiction over the Sessions Court order dated 25 May 2021.

[24] In his submission, learned counsel for the first respondent said they fully support the High Court's decision. They did not mention the High Court order is a ruling.

[25] We agree with the appellant's submission. When the High Court heard the appeal, it was sitting as an appellate court, exercising its appellate jurisdiction over the Sessions Court order dated 25 May 2021. This is an interlocutory appeal. There was no preliminary issue at the hearing of the appeal that required the High Court Judge to make a ruling. The only role

A the High Court Judge had is to determine whether the Sessions Court had applied a wrong principle or had taken into account irrelevant matters or excluded matters that it ought to have taken into account when it did not allow intervention and the setting aside of the 29 March 2017 judgment. If the High Court finds there is no error of law or fact in the Sessions Court
B order, then he has to dismiss the appeal. Likewise, if the High Court finds there is an error in the Sessions Court order, he has to allow the appeal.

[26] In this case, the learned High Court Judge had allowed the first respondent's appeal in part by setting aside the Sessions Court order dated 25 May 2021 and allowing intervention (first order). In addition to that, he
C also ordered for the matter to be remitted to the Sessions Court to hear the first respondent's application to set aside the judgment dated 29 March 2017 (second order). The effect of remitting the matter to the Sessions Court is two-fold. First, the High Court had instructed the Sessions Court Judge to hear the first respondent's application to set aside the judgment dated 29
D March 2017 again for the second time. Secondly, the first respondent is given a second chance to set aside the said judgment. Our considered view is that both orders of the High Court are not a ruling but a decision which are detrimental to the appellant and are therefore appealable. We, therefore, hold that the High Court Judge erred when he held that the order he made
E on 26 September 2022 is a ruling.

The Sessions Court Proceeding Had Concluded

[27] In *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121, the Federal Court held that "although an application to intervene may be made at any stage of the proceedings, it means before judgment,
F otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge also becomes *functus officio*."

[28] It is not in dispute that the proceedings in the Sessions Court had concluded with the pronouncement of the judgment dated 29 March 2017.
G The said judgment had disposed of the rights and liabilities of the parties. In the said judgment, it was clearly stated that the second respondent (defendant) was liable 100%. Quantum was assessed at RM2.5 million. There was no issue left to be determined. The Sessions Court Judge has been *functus officio*.

H **[29]** In addition to that, encl. 25 was filed on 5 October 2020, three years after the judgment was entered on 29 March 2017. The proceedings had long concluded and the Sessions Court was *functus officio* when encl. 25 was filed.

[30] Based on the Federal Court decision in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121, the learned Sessions
I Court Judge was right when she held that the Sessions Court proceeding had concluded. Hence, there is no proceeding in existence for the first respondent

to intervene. Consequentially, there is no error in the Sessions Court order dated 25 May 2021 in disallowing intervention. It, therefore, follows that there is no justification for the High Court to set aside the Sessions Court order. In the circumstances aforesaid, we hold that the High Court Judge had erred when he set aside the Sessions Court order dated 25 May 2021.

The First Respondent Was Estopped From Filing Enclosure 25

[31] It is not in dispute that prior to obtaining the declaratory order, the first respondent had appointed Messrs VM Kumaran & Co to represent the second respondent. After obtaining the declaratory order, the first respondent elected to instruct Messrs VM Kumaran to discharge themselves from representing the second respondent. So, it is a situation where the first respondent had elected not to defend the appellant's claims.

[32] Now, the first respondent argued that they are entitled to intervene based on the Court of Appeal decision in *AmGeneral Insurance Bhd v. Iskandar Mohd Nuli* [2016] 2 CLJ 1; [2016] 1 MLJ 818. Briefly, the facts in *Mohd Nuli*'s case are as follows. The owner of a motorcar took out a motor insurance policy with the plaintiff (Am General Insurance). The owner loaned the car to the second defendant to drive into Singapore with the second defendant's wife as a passenger. In Singapore, the car was involved in an accident with a crane truck. The second defendant's wife instituted an action for negligence in the High Court of Singapore against the second defendant and the driver of the crane truck.

[33] Meanwhile, the plaintiff applied to the High Court at Kuala Lumpur for a declaration that the plaintiff is not liable to satisfy any judgment that may be entered by a Malaysian passenger who was injured in a road traffic accident in Singapore against the second defendant on the grounds that the insurance policy for the car driven by the second defendant which was issued by the plaintiff does not cover passenger liability. The High Court dismissed the plaintiff's application on the grounds that the plaintiff has waived its right to deny liability on the policy due to the conduct of the plaintiff having appointed solicitors to defend the second defendant in the Singapore suit and accordingly, the plaintiff is estopped from maintaining the action. The plaintiff appealed to the Court of Appeal. In allowing the plaintiff's appeal, the court held that "there was a commonality in the interest of the plaintiff and the second defendant, which was to avoid the possibility of judgment by default and to argue that the driver of the other vehicle was solely or mainly liable for the accident. There was no conflict of interest in acting for both insured and insurers."

[34] The decision of the Court of Appeal in *AmGeneral Insurance* was dated 16 December 2015. The discharge order applied by Messrs VM Kumaran was granted on 23 November 2016. The first respondent knew about the fraud since 2015. Clearly, even before the discharge order was obtained, the

law on waiver of the declaratory order of fraudulent claim was already made clear by the Court of Appeal in *AmGeneral Insurance*'s case. Following *AmGeneral Insurance*'s case, the first respondent could and should have stayed on, based on commonality of interest to defend and to mitigate both liability and quantum. It is also open to the first respondent to apply to intervene and to be added as a second defendant as the proceedings were still alive but the first respondent chose not to do that. As such, the learned Sessions Judge was right when she held that the first respondent, by their conduct, is estopped now from intervening in the proceedings herein especially when the proceedings had concluded.

[35] In short, despite obtaining the declaratory order, the first respondent had ample opportunity to disprove the appellant's case against the second respondent by joining the Sessions Court proceeding as the second defendant before the proceedings were concluded. But, the first respondent has made a conscious decision not to defend the appellant's claim and abandon the second respondent. It is too late now for the first respondent to argue that as the ultimate paymaster, they should be allowed to intervene and set aside the judgment. Therefore, we agree with the Sessions Judge that estoppel by conduct bars the first respondent from filing encl. 25.

Judgment Dated 29 March 2017 Is A Final Judgment And Cannot Be Set Aside

[36] The first respondent constantly claimed the judgment dated 29 March 2017 is a default judgment because the said judgment allegedly contravenes s. 101 of the Evidence Act 1950 and the decision in *Wong Thin Yit v. Mohamed Ali* [1971] CLJU 151; [1971] 1 LNS 151; [1971] 2 MLJ 175.

[37] Learned counsel for the appellant submitted that the judgment dated 29 March 2017 is not a default judgment because two witnesses gave evidence and submissions were heard. He refers us to the case of *Adzmi Ali & Anor v. Mohd Isa Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37. The facts in that case in brief are as follows. The plaintiff (respondent) brought a claim for personal injuries and pecuniary losses arising from a motor vehicle accident. Despite the writ and statement of claim were duly served on the appellant (defendant), the appellant did not enter appearance. Judgment in default was entered on 15 March 1985 and damages to be assessed. On 15 June 1985, damages were assessed in the sum of RM241,032 and judgment was entered in favour of the respondent. On 19 September 1985, the appellant took out a notice of motion for the interlocutory judgment in default of appearance dated 15 March 1985 and the judgment dated 15 June 1985 to be set aside and for leave to defend the action. The Supreme Court held that "the term interlocutory judgment means that such a judgment is interlocutory only as to amount and is final as to the right of the plaintiff to recover damages and when damages have been assessed it becomes a final judgment."

[38] Based on the Supreme Court decision in *Adzmi Ali*'s case, we hold it is erroneous for the first respondent to label the judgment dated 29 March 2017 as a default judgment when in actual fact, it is a judgment after damages have been assessed and is a final judgment. The said judgment is a regular valid judgment and enforceable against the first respondent.

[39] In *Hock Hua Bank Bhd v. Sahari Murid* [1980] CLJU 92; [1980] 1 LNS 92; [1981] 1 MLJ 143, the Federal Court held "Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment."

[40] On the authority of *Hock Hua Bank Bhd v. Sahari Murid*, not only the first respondent cannot apply to set aside the said judgment in the same action, but the Sessions Court also had no power to set aside its own order after it has been entered. Therefore, the learned Sessions Judge was right when she held that the only way to overcome this hurdle was for the first respondent to file a fresh action to set aside the said judgment.

Our Decision

[41] We find merits in this appeal. Accordingly, we allow the appeal and set aside the High Court order dated 26 September 2022. The first respondent is to pay costs of RM10,000 to the appellant subject to allocatur.